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**LESSONS FOR LAWYERS FROM ENRON AND OTHER CASES.**  
**RELATIONS WITH CLIENTS AND AUTHORITIES: LEGAL**  
**PROFESSIONAL PRIVILEGE. OBJECTIVE ASSESSMENT OF CLIENT**  
**CONDUCT. CONFLICTS OF INTERESTS: TO WHOM DOES A**  
**LAWYER OWE LOYALTY?**

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**Overview**

Those were the days where the legal professional privilege of lawyers would go unchallenged as a crystallised concept.

Effectively, the at once right and duty of confidentiality of lawyers, has been lately the object of growing and mounting pressure.

This pressure results from a decisive wish to combat crime, of which Money Laundering Directive<sup>1</sup> and Sarbanes-Oxley Act<sup>2</sup> are clear examples. This has also largely been brought about by the most recent examples of bad corporate governance practices, which lead to the collapse of some of the most prominent corporate players in the world markets.

This pressure and the scrutiny, under which legal privilege has been put, has led us at the current juncture, to reflect on the meaning and scope of this concept.

This paper focuses on the definition of legal privilege and its objectives. It will also tries to establish if the concept requires, as some argue, rethinking, reformulation, change and development, to adapt to new challenges of our profession, or if there needs to be in-depth analysis of the principles and values underpinned thereto. Special thought must be given to the fact that the essence of the lawyer's function, as a depositary of clients' trust and as a defender of his

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<sup>1</sup> Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering.

<sup>2</sup> The Sarbanes-Oxley Act was voted on the 23<sup>rd</sup> January 2002 and came into effect on the 30<sup>th</sup> of July 2002. This act amends the Securities Exchange Act of 1934 and the Securities Act of 1933.

interests, cannot override the most important duty of the lawyer in society which is to serve the interests of Justice as well as of the Law.

In defending these supreme values, lawyers must preserve an equally important principle, which is their independence. An independent legal profession leads to a strong bench and a strong bench to a democratic society, as it constitutes an essential guarantee for the promotion and protection of human rights and is necessary for effective and adequate access to legal services. It is a cornerstone in the establishment and maintenance of the rule of law.

Lawyers have to play an essential role in the administration of justice and in safeguarding human rights and fundamental freedoms. In order to carry out their work in a wholly independent manner, it is vital that there is no pressure on them, particularly with regard to their duty of legal professional privilege, which is a core value in the legal profession.

### **The concept**

Legal privilege<sup>3</sup> assumes the right to confidentiality, conferred on every person seeking the advice and assistance from a lawyer in order to vindicate his rights and liberties and to ensure the fair and proper administration of Justice.

The principle that specifically guides this concept<sup>4</sup> is generally considered as being the one of trust between the client and the lawyer and as such is its hallmark. *The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent*

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<sup>3</sup> The nature and extent of the rights and privileges are basically the same in all the different countries, although there are different terminologies, which designate the same reality. The English expression “legal professional privilege” expresses a common idea to all EU member states, as being a right that translates an important exception to the normal rules of law. The different terminologies as “legal privilege”, “duty of secrecy”, “professional secret”, “professional secrecy”, “duty of confidentiality” are similar as they also express the same idea.. We will refer hereinafter to the concept under analysis as “legal privilege”.

<sup>4</sup> Commission Consultative des Barreaux de la Communauté Européenne. *The professional secret, confidentiality and legal professional privilege in the nine member states of the European Community*, a report prepared by D.A.O. Edward, Q.C., Treasurer of the Faculty of Advocates in Scotland, Rapporteur-Général.

*the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.*<sup>5</sup>

We can observe that in all member states of the European Union and in the United States of America, the law protects information that has been brought to the lawyer's<sup>6</sup> knowledge by his client.

In general terms, *lawyer's codes of conduct respect the same core values both in Europe and in the United States: independence of professional judgment, confidentiality of client communications, loyalty, and the avoidance of conflicts of interest*<sup>7</sup>, and they both believe the lawyer's duty of confidentiality owed to their clients, to be the essence of the client-lawyer relationship.

However, the Common Law and Civil Law systems have different approaches to the legal privilege matter.

In the Common Law systems, the concept of legal privilege was developed mainly by reference to the discovery process in civil cases. The lawyers-client privilege guarantees that all the information communicated by the client to his lawyer cannot be used as evidence against him. As a result, in Common Law system countries, the lawyer-client legal privilege is much more limited, as it is not considered as a fundamental principle and it is given neither constitutional nor criminal protection. Furthermore, the legal professional privilege may be breached for reasons of public interest, e.g., when a client seeks legal advice to commit a fraud or a crime, or when the lawyer is used by the client for the execution of a crime or fraud, even if the lawyer is unaware of such circumstances. There may also be breach of legal privilege when disclosure is necessary to establish a defence upon lawyer's or client's interests, e.g., if the client is being accused of committing a crime and the lawyer knows facts that prove his innocence. The nature of legal privilege in Common Law systems is essentially contractual as the client is able to authorise the lawyer to disclose any information.

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<sup>5</sup> See *ABA Model Rules of Professional Conduct*.

<sup>6</sup> In this work the word "lawyer" enshrines all the different denominations we can find in the countries in which we base our analysis, concerning the category of private professional persons legally qualified to pay legal assistance in their different aspects.

<sup>7</sup> American Bar Association – Central European and Eurasian Law Initiative, "*Professional legal Ethics: - a comparative perspective*", CEELI Concept Paper Series, Maya Goldstein Bolocan, Editor, 2002.

Civil Law systems do not have a similar discovery concept in civil cases and they do not actually need it. Effectively, the professional secret is a general principle protected by the main Civil law European countries like Germany<sup>8</sup>, Belgium<sup>9</sup>, Italy<sup>10</sup>, Spain<sup>11</sup>, France<sup>12</sup> and Portugal<sup>13</sup>. Their Constitutions, Penal Codes and Codes Conduct provide for an obligation of confidentiality for persons who, given the nature of their functions are the depositories of the secrets of others. A breach of this obligation is regarded as crime punished by imprisonment or fine, which reflects the role of the legal profession privilege in protecting public interest, individual privacy and democracy. Furthermore, its violation may also result in disciplinary action and civil liability for lawyers. Therefore, the protection of legal privilege is general, absolute and is not subject to statutes of limitation with no time limit. It also extends to both advice and litigation including correspondence with clients and between lawyers, any communications received by the lawyers in the exercise of their profession, and the identity of clients.

Moreover, neither the client nor the judge or other authority, may release the lawyer from such a duty, as he is considered the “*maitre du secret*” and therefore, the lawyer must decide according to his own conscience whether, under what circumstances and to what extent his duty to keep secret should be maintained.<sup>14</sup>

There is no law, which requires or permits disclosure of a professional secret, even where the lawyer is called upon to give evidence in legal

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<sup>8</sup> German Penal Code, section 203, Subsection 1 n. 3 and Federal Code of Ethics.

<sup>9</sup> Code Pénal, article 458.

<sup>10</sup> Codice Penale, articolo 622; Codice di Procedura Penale, articolo 351; Codice Deontolo by Consiglio Nazionale Forense.

<sup>11</sup> Estatuto General de la Abogacía Española; Código Deontológico de la Abogacía Española, aprobado por el Pleno del Consejo General de la Abogacía Española de 30 de Junio de 2000. (Spanish Code of Conduct)

<sup>12</sup> Law n. 71/1130 of 31<sup>st</sup> December 197, article 66, n. 5 and Decree n. 91/1197, of 27<sup>th</sup> November of 1991, article 2, which are the principal rules governing the legal professional in France; see also the French Penal Code (Code Pénal), article 226, n. 13 and the French Penal Procedures Code, article 109; Règlement Intérieur Harmonisé of 1999 by the Conceil National des Barreaux.

<sup>13</sup> Estatuto da Ordem dos Advogados (Portuguese Lawyers' Code of Conduct), Decree-Law n.º 84/84, of the 16th March of 1984, articles 81 e 83, n. 1 e); Código de Processo Penal (Portuguese Penal Procedure Code), article 135; Código Penal (Portuguese Penal Code), articles 195, 360, n. 2 and 367; Código Processo Civil (Portuguese Civil Procedure Code), article 618, n. 3; Law 3/99, of 13th January 1999

<sup>14</sup> There are some exceptions. For instance, in Portugal, the Court can release the lawyer from such duty after a proper inquiry on the reasons of the confidentiality and after hearing of the Portuguese Bar.

proceedings. However, there are in all these EU member states, some exceptions to this rule. The lawyer may reveal a secret if he is being accused of a crime and to protect his clients legitimate interests, where the failure to disclose a secret can lead to irreparable harm or injustice.

The foundations of legal privilege are the fundamental right of every citizen to have full access to the law and justice, which depends on the guarantee that everything told by the client to his/her lawyer is confidential and will not be divulged.

The concept of legal privilege is therefore composed of the following basic principles<sup>15</sup>:

1. The essence of the lawyer's function as a recipient of confidential information that the client would not tell anyone else;
2. The trust confidence relationship with the client;
3. The interests of administration of Justice;
4. The client's interests;

In the light of recent events, such as the "Enron" scandal, these basic principles should be further analysed in order to establish clearer boundaries delineating legal professional privilege, specially in criminal situations and particularly in economic criminality, which includes money laundering, insider dealing, market speculation, embezzlement and fraud.

The recent economic scandals have highlighted the necessity for strong measures against wrongdoing inside companies, specially listed companies where important economic interests are put in danger by illicit conduct.

Many of the law firms that represented Enron, have been or will be in due course, sued by shareholders and by creditors and will, with all probability, be subject to disciplinary and criminal proceedings, being accused of aiding misconduct and in many cases, of assisting the client in acting against unethically and even in violating the law. Legal professional privilege has been seen under

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<sup>15</sup> See Code of Conduct for Lawyers in the European Union (CCBE), point 2.3.

the present circumstances as a driving force in the promotion of such wrongful activities undermining the prosecution of the interests of the Law and Justice.

We believe that legal privilege cannot be used to foster wrongdoing or criminal practices. Therefore, a new perspective on legal professional privilege features has become imminent.

### **Confidentiality/Trust/Clients interests: Lawyers' "eyes wide shut"?**

Confidentiality breeds trust and both are instrumental to the defence of the clients' interests. One of lawyers' primary duties is to defend the client's legitimate interests to the best of their ability, according to the law. As such, it is essential mutual trust between the lawyer and his client. Legal privilege allows the client to communicate freely and frankly with the lawyer guaranteed that none of the information will be divulged. To exercise representation properly and to fully defend the client's interests the lawyer must have unconditional access to full information.

For these reasons, the pursuit of the clients' interests must be protected through the safeguarding of trust and confidentiality, but these concepts cannot become a basis for violating the law. The lawyer must not forget that his primary duty is towards the Law and Justice and therefore, if the client cannot be persuaded not acting contrary to the law the lawyer must withdraw from representation.

What then is the lawyer supposed to do if he becomes aware – under conditions of confidentiality – that his client is acting, or intends to act unlawfully? If the client is a company, diligent execution of the mandate imposes on him the duty to advise formerly the relevant corporate bodies responsible for such violations and advise on the respective remedies. If the client is an individual the duty does not change, otherwise it would imply discrimination attributing different kinds of importance to clients, which would be contrary to the ethics of the legal profession.

However, it is well known that corporate client's demands are far more complex as they comprise multiple interests, which must be taken into

consideration by lawyers who represent them. By observing the recent economic scandals like Enron, WorldCom, Adelphia, Tyco, ImClone, Xerox, RiteAid and others, we can see that the interests of shareholders have been seriously damaged.

In the case of corporate clients, conflicts of interest may arise inside the company as the lawyer, during the representation deals with certain persons with specific functions whose interests frequently collide with the interests of the company itself. The lawyer must realise that the duty of loyalty is owed to the corporation and its board of directors and not to their officials.

Therefore, when an executive wants to act in a way that is contrary to the interests of the company the lawyer must simply refuse to engage in such an act. If the lawyer knows a financial disclosure he is preparing is false, he must at the very least withdraw from representation avoiding becoming an accomplice. If a lawyer knows of any material violation or wrongdoing inside the company, his duty is not to keep his “eyes wide shut”, but to report it up the company’s “ladder”. However, this cannot lead us to conclude that the lawyer should report such a material violation outside the company, otherwise that would lead to a breach of the legal privilege.

The lawyer as an independent professional cannot be compelled in any way, to proceed as a “policeman” or an executive arm of the regulatory or supervisory authorities. As an independent professional the lawyer must be able to advise his client of the limits of the law without any obstruction or pressure whatsoever. Frequently, corporate clients become the principal and some times the sole client of the lawyer acting individually or as representative of a law firm, which implies the economic dependence of the lawyer upon that client. Where the contribution of the client to the law firm or to the lawyer is substantial, in terms of income and reputation, the probability of the lawyer doing everything and anything to accommodate the client’s wishes is increasingly high. However, the potential economic dependence of the lawyer representing the client cannot allow the former to become subservient to the latter and breaking the law.

The duty of the lawyer to notify his client is an essential way to frustrate wrongdoing inside the company, and it must be seen as a way of compliance with

the duty of loyalty and as well as a diligent way of representation. Although it consists of a communication of facts under confidentiality, the information remains secret as it is communicated only inside the corporation, according to the concept of corporate client and the duty of the lawyer to keep his client duly informed. Legal privilege is not, therefore, breached.

The lawyer must be aware that if he is economically dependent on the client, he must do everything to ensure that the client does not break the law since that will sooner or later lead the business to fail, which would definitely imply the destruction of the source of the principal income as well as the destruction of the lawyer's reputation and prestige. Therefore, if a client insists on breaking the law even after the diligent advice of the lawyer not to do so then the lawyer must cease the mandate maintaining legal privilege as a fundamental right.

### **Limiting the Legal Professional Privilege?**

Whenever it is necessary to adapt or reformulate the existing concept of legal privilege as well as the correspondent legal framework it is fundamental that proper interpretation of the values and principles that underpin such concept as well as the essence of lawyer's profession, which is the defence of the law as a primary and fundamental duty, be carried out.

Legal privilege is based on the fundamental rights to liberty and security of person and proper access to the law and justice. This can only be achieved if the citizen is able to freely communicate with his lawyer. Legal privilege is therefore an inalienable right recognized as a human right under Articles 5, 6 and 8 of the European Convention on Human Rights. However, it cannot be seen as being in conflict or hampering the rule of law. The interpretation and an eventual remodelling of the concept of legal privilege must be carried out effectively, responding in an equitable manner, to the questions posed by the new threats to the social and legal order, of which economic criminality and the recent corporate scandals are clear examples.

Allegedly for some, legal privilege is acting as a shield against the proposed measures to fight these threats. However, the defence of such a stance cannot water down the principles and values that define and identify legal privilege - being the hallmark of the lawyers' profession - as it is the essence of the lawyers' function, as a recipient of confidential information and the clients' right to unconditional access to justice and defence of their legitimate interests. Therefore, eventual exceptions to these fundamental principles, even to fight rising criminality, must be carefully considered.

The English and the American codes of conduct are clear in this matter as they establish important exceptions to legal privilege.

In the United Kingdom, the rule 16.00 of the Guide to the Professional Conduct of Solicitors<sup>16</sup> states that, "*the duty of confidentiality is fundamental to the relationship of solicitor and client. It exists as an obligation in law, having regard to the nature of the contract of retainer, and as a matter of conduct. All the information a solicitor discovers about a client in the course of a retainer is confidential; whether the information is also privileged is a separate legal issue.*" [...] "*In considering this chapter, solicitors should have in mind the fundamental nature of the duty and remember that the circumstances in which the confidentiality can be overridden are rare*". The rule 16.02, which states that "*the duty of confidentiality does not apply to information acquired by a solicitor where he or she is being used by the client to facilitate the commission of a crime or fraud because that is not within the scope of a professional retainer.*"

In the UK the client may lose that privilege against his will, e.g., when he has communicated to his lawyer that he is going or that he is committing a fraud or crime (*Privilegium contra rempublicam non valet*).<sup>17</sup>

In the USA, the ABA Model Rule 1.6 (a), as amended in February 2002, provides "*A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly*

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<sup>16</sup> See The Guide to the Professional Conduct of Solicitors, Eight Edition, 1999, Chapter 16, Rule 16.02, point 1. The Rule 16.01, point 1, establishes the distinction between the duty of confidentiality and the legal privilege. The former is *extended to all matters communicated to a solicitor by the client or on behalf of the client* whereas the latter protects *communications between a client and a solicitor from being disclosed, even in a court of law.*

<sup>17</sup> Commission (...) op. cit., point 12.

*authorized in order to carry out the representation*". However, paragraph (b) provides important exceptions as a lawyer may reveal information in four circumstances:

1. *"To prevent reasonably certain death or substantial bodily harm;"*
2. *"To secure legal advice about the lawyer's compliance with these Rules;"*
3. *"To establish a claim or defence on behalf of the lawyer in a controversy between the lawyer and his client, to establish a defence to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceedings concerning the lawyer's representation of the client;"*
4. *To comply with other law or a court order;"*

This rule and its exceptions are not mandatory. However, some states make these exceptions mandatory, especially regarding physical crimes, considering the supreme value of human life.<sup>18</sup>

### **The "Enron era"**

The recent corporate scandals, namely Enron, brought about the famous Sarbanes-Oxley Act<sup>19</sup>, which in § 307 requires lawyers to report evidence of *"a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or to the chief executive officer of the company (or the equivalent thereof)"*, which include the Qualified Legal Compliance Committee ("QLCC") and *"if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or*

<sup>18</sup> ABA Model Rules of Professional Conduct, page 19.

<sup>19</sup> The Sarbanes-Oxley Act was voted on the 23<sup>rd</sup> January 2002 and came into effect on the 30<sup>th</sup> of July 2002. This act amends the Securities Exchange Act of 1934 and the Securities Act of 1933.

to the board of directors.” In particular § 205.3<sup>20</sup> of the Securities and Exchange Commission (hereinafter SEC) proposed rules, outlines the duty of a lawyer who appears or practices before the SEC in the representation of an issuer to report evidence of a “*material violation*” to the SEC, which would be triggered when the lawyer “*reasonably believes*” that a material violation has occurred, is occurring or is about to occur.

By imposing the “up-the-ladder” reporting system SEC intends to protect the company and the investors.

### **Reporting “up the ladder”**

In European jurisdictions there are no rules requiring or forbidding a reporting duty. Effectively, this duty is already in place in Civil Law European systems as it arises from the general ethical and contractual obligation to give the client the best and safest possible advice. If lawyers fail to comply with this duty they can be found liable in civil law for damages, on the grounds of professional negligence.

Therefore, the duty to “report up-the ladder” does not really consist of a new obligation to European lawyers, since most of the EU Countries have already this obligation. It exists, as an ethical duty imposed on the lawyer to inform his corporate client if any wrongdoing is taking place. This duty arises from the client/lawyer relationship regarding the fact that in such cases *the client is the company itself and not their officials*<sup>21</sup>.

### **“Noisy withdrawal”**

The obligation of “noisy withdrawal”, as outlined in § 205.3, requires lawyers to notify the SEC if they think a company continues to breach securities laws even after they have alerted the company’s in-house lawyers, audit committee or full board. This means that the lawyer would communicate to

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<sup>20</sup> These new rules were voted in the 6<sup>th</sup> November 2002.

<sup>21</sup> CCBE response to SEC proposed rule: “Implementation of Standards of Professional Conduct for Attorneys”, (File Nos. S7-45-02; 33-8150.wp)

authorities information that was under confidentiality. The legal profession unanimously condemned that measure, saying it would have turned lawyers into policemen and undermined their ability to advise clients to obey the law. This obligation would also deeply violate the principle of legal privilege as it is conceived in main European states resulting in criminal and disciplinary penalties upon lawyers who comply with this measure. Nevertheless, the actual features of the Sarbanes-Oxley Act<sup>22</sup>, through successive amendments have become more flexible to non-U.S. lawyers, since they expressly provide that the § 205 is not applicable to foreign lawyers who are not admitted in the United States and who do not advise clients regarding U.S. law.<sup>23</sup> Concerning the “noisy withdrawal” it was also voted to propose that instead of the lawyer, the issuer would be obliged to publicly disclose the lawyer’s withdrawal and the circumstances related thereto. These relevant changes will allow the implementation of the Sarbanes-Oxley Act without disregarding the protection conferred to the legal privilege as it is conceived in Civil Law system countries.

On this side of the Atlantic Ocean, a Directive on Money Laundering, 2001/97/EC, is now being implemented by the EU Member states. It imposes specific obligations regarding the fight against money laundering, and it provides important limitations to legal privilege. In the paragraph 6.1 it is said that lawyers should cooperate with the authorities “(a) - *by informing those authorities, on their own initiative, of any fact which might be an indication of money laundering* (b) - *by furnishing those authorities, at their request, with all the necessary information, in accordance with the procedures established by the applicable legislation*”. Although there is a especial exception provided in paragraph 6.3., where it says that “*Member States shall not obliged to apply the reporting obligations laid down in paragraph 1 to notaries, independent legal professionals, auditors, external accountants and tax advisors with regard to*

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<sup>22</sup> The Securities and Exchange Commission adopted these final rules under Section 307 of the Sarbanes-Oxley Act regulating the conduct of lawyers, in 23<sup>rd</sup> January 2003, although these rules will only become effective on the 5<sup>th</sup> August 2003.

<sup>23</sup> A new category called “non-appearing foreign lawyers”. This refers to lawyers *who are admitted in a jurisdiction outside the United States, who do not hold themselves out as practicing, and do not give advice on, U.S. federal or state securities laws, and whose “appearing and practicing” conduct is only incidental to the practice of law outside the United States or is in consultation with U.S. counsel.* According to the SEC this definition should exclude almost all the foreign lawyers.

*information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings”*, this Directive imposes a reporting obligation that overrides the clients’ fundamental right to communicate freely and frankly with a lawyer without any obstacle or restriction whatsoever, which is recognised by the main EU countries’ Constitutions and in international law.

The implementation of this Directive by the different EU Member states, will force them to adapt or even change radically the legal framework that embodies the concept of legal privilege. Portugal will be no exception to this.

### **The Portuguese case**

In Portugal, which is also based on a Civil Law system, the protection conferred on legal privilege is no different from other EU Member states, based on Civil law. Portuguese lawyers are bound to professional secrecy by a number of professional rules contained chiefly in the Portuguese lawyers’ Code of Conduct.<sup>24</sup> According to articles 81, n. 1 a), b), c), d), n. 2, 3 and 4 and 83, n.1 e) of this code, Portuguese lawyers and foreign lawyers who practise professionally in Portugal are bound to professional secrecy with reference to all facts and documents with which they come into contact by virtue of their professional activity, including information provided by the other party, and facts produced during negotiations. The duty of professional secrecy exists even if the lawyer has not accepted the mandate and it is imposed upon lawyers who directly or indirectly had any part in the case, with no time limit. This obligation only ceases to exist when it is necessary to protect the dignity, the rights and the legitimate interests of the client or his representatives and of the lawyers themselves,

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<sup>24</sup> “Estatuto da Ordem dos Advogados” (Portuguese Lawyers’ Code of Conduct), as approved by Decree-Law 84/84, of 16<sup>th</sup> March of 1984, as amended by Decree-Laws 6/86 of 23<sup>rd</sup> March of 1986 and 325/88 of 23<sup>rd</sup> September 1988, and by Laws n. 33/94 of 6<sup>th</sup> September 1994, 30-E/2000 of December 2000 and 80/2001 of 20 July 2001, which instated the Portuguese Bar and regulates in detail lawyer’s ethical duties.

through previous authorisation of the President of the District Council of the Portuguese Bar, which can be refused. The lawyer is able then, to appeal against this decision to the “*Bastonário*” of the Portuguese Bar (President of the Portuguese Bar).

During her term as President of the Portuguese Bar, “*Bastonária*” Maria de Jesus Serra Lopes performed several judgements<sup>25</sup> in which she has expressed the idea that legal professional privilege is regarded as a principle of public interest and a cornerstone of the legal profession prevailing amongst other duties. She quotes Fernand Payen, in “*Le Barreau*”, which says that not even the client can free the lawyer from such duty. Moreover, the legal privilege is considered a supreme value for the proper administration of justice. Therefore, in case of conflict of interests between the values that underpin the proper administration of justice such as the legal privilege and any other economic interests, the former should prevail.

We also outline a singular Portuguese High Court of Justice’s judgement<sup>26</sup>, which remarkably sets out relevant principles on the interpretation of the provisions that rule the Portuguese concept of legal privilege. The duty of cooperation with the Justice as it is outlined in the Portuguese Civil Procedure Code (C.P.C.)<sup>27</sup>, under articles 519 and 618 and in the Portuguese Penal Procedure Code (C.P.P.)<sup>28</sup>, under article 135, suffers important limitations, particularly with reference to legal privilege, as lawyers can refuse to testify in certain circumstances. Legal privilege is unanimously regarded as being a fundamental right enshrined in the Portuguese Constitution under articles 20 and 208, embodying the public interest by protecting the democratic right to access to Justice and therefore, as a hallmark of the lawyer’s profession. It is precisely for that reason that the legal privilege is also protected under article 195 of the

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<sup>25</sup> Process R/7, R/14 and R/23 of the General Council of the Portuguese Bar, by “*Bastonária*” Maria de Jesus Serra Lopes, 1992. See also Ac. S.T.A (Judgement of the Administration High Court) of 4<sup>th</sup> of May of 1993.

<sup>26</sup> Ac. S.T.J. (Judgement of the Portuguese High Court of Justice) of 25<sup>th</sup> June 1988, commented by Rodrigo Santiago, C. J., year XII, 5, page 244 ff.

<sup>27</sup> Código de Processo Civil (Portuguese Civil Procedure Code)

<sup>28</sup> Código de Processo Penal (Portuguese Penal Procedure Code).

Portuguese Penal Code (C.P.)<sup>29</sup> and that a violation of legal privilege is a criminal offence punished by imprisonment or by fine.

The implementation of provisions aimed at combating rising criminality, that impose exceptions to the legal professional privilege of lawyers and their obligation to denounce their clients using confidential information obtained in the course of the exercise of their profession, are not acceptable. Limitations to legal professional privilege in breach of the principles that underpin the concept constitute an intolerable breach of trust and a violation of fundamental rights of citizens to proper access justice as guaranteed by the Constitution of the Republic.

A great debate is developing around amending the Portuguese Lawyers' Code of Conduct in order to reflect the transposition of the Directive on money laundering<sup>30</sup>. Portuguese lawyers are firmly against any amendments to the existing legal framework or even to their Code of Conduct regarding legal privilege. The proposed amendments consist of increasing the typical situations where legal privilege ceases to exist and as well as the situations that trigger reporting and withdrawal duties. The eventual reporting by the lawyer, of criminal actions perpetrated by his clients to the authorities would be to the Portuguese Bar, which in turn, would bring those facts to the knowledge of the public prosecutor office DIAP, a special public authority. Failure to comply with these obligations would trigger disciplinary sanctions<sup>31</sup>. This reporting system breaches legal professional privilege as it is conceived in Civil law systems and compromises the legitimate right of every citizen to look for proper legal advice and access to justice.

### **Simply withdrawal?**

It is widely argued by eminent Portuguese lawyers, that legal privilege is the most important lawyer's duty "*as it embodies the fiduciary link between the*

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<sup>29</sup> Código Penal (Portuguese Penal Code).

<sup>30</sup> Directive 2001/97/EC.

<sup>31</sup> Portuguese Bar, Lisbon District Council, Conference on "*O Segredo Profissional e o Branqueamento de Capitais*" (The legal privilege and Money Laundering), speech by Vitalino Canas.

lawyer and his client”<sup>32</sup> and that, “the nature of the legal privilege obligation is intrinsic to the lawyer’s profession”, as being “a pillar of the Rule of law and therefore of Democracy”. However, as Germano Marques da Silva <sup>33</sup> says, “the lawyer cannot exercise the mandate consciously against the true and the law”. Therefore, if the lawyer knows that his client’s cause is illegal or that its conduct can provoke considerable damages to third parties, then he must advise and persuade him to stop his illegal or damaging conduct and if he persists then the lawyer must be able to cease his mandate, communicating his decision to the ruling Bar.

The same right and duty of withdrawal is applicable if the client is an organization or company. If a lawyer for an organisation or company knows of a matter related to his representation that consists of a violation of a legal obligation that is likely to result in substantial injury, the lawyer must act in the best interest of the organisation reporting “up-the-ladder”. However, as even the SEC’s Rules of Practice state, these must carefully provide for minimal “disruption of the organisation and the risk of revealing information relating the representation to persons outside the organisation”<sup>34</sup>. The rules goes on to state that “if, despite the lawyer’s efforts the highest authority that can act on behalf of the organisation insists upon action, or refusal to act, that is clearly a violation of law and is likely to result in a substantial injury to the organisation, the lawyer must resign.”<sup>35</sup>

Legal privilege must be considered of paramount importance to a democratic society that pursues a proper administration of justice. It is considered a fundamental right, which embodies proper access to legal advice and therefore justice.

It is beyond doubt that the reporting or even the “tipping-off” obligations upon lawyers dilutes or adulterates the concept of legal privilege, a protector of

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<sup>32</sup> *Iniciação à Advocacia* (Introduction to Legal Practice), by António Arnaut 6.º Edição, Coimbra Editora.

<sup>33</sup> *A Responsabilidade Profissional do Advogado (Perspectiva Penal)* (Portuguese Lawyers’ Professional Responsibility (Penal Perspective), by Germano Marques da Silva, in *Estudos dedicados ao Prof. Doutor Mário Júlio de Almeida Costa*, Lisboa, 2002, pages 629 and ff.

<sup>34</sup> See Rule 2 (e) of the SEC’s Rules of Practice

<sup>35</sup> See, *Why lawyers should not become corporate watchdogs*, by Ira Schacter and Alexandra Scheibe, in *International Financial Law Review*, September 2002

the essential trust inherent to the clients/lawyer relationship, on which the democratic right of access to justice is based. It is clear that such obligations would impair full access to Justice. Furthermore, implementation of measures such as “noisy withdrawal” would turn lawyers into corporate watchdogs and would compromise irretrievably the perfect exercise of their mandates.

### **The lawyer’s ultimate duty**

Although the legal professional privilege right and duty of the lawyer is inviolable, his primary duty is towards the law. The full exercise of the lawyer’s functions as a guardian of justice <sup>36</sup> imposes on him as a primary duty, the defence of the rule of law. A lawyer cannot in any circumstance, continue to defend a client where he persists in violating the law or committing a crime. The duty of withdrawal is then, the ultimate course of action for the lawyer.

The development of the concept of withdrawal where necessary, can be achieved by inserting in Codes of Conduct clearer and detailed provisions concerning the duty of the lawyer not to engage in illegal causes, ceasing the representation whenever the client cannot be persuaded not to violate the law, as well as sanctions for failing to comply with such applicable provisions.

For some authors the duty of withdrawal is already present in the main European lawyer’s Codes of Conduct. In Portugal the duty of withdrawal, in the case of the client persisting in violating the law, is considered to be present in the Portuguese lawyers’ Code of Conduct, article 78 b) and c) where it says that “*the lawyer cannot act against the law and must refuse to defend unfair causes*” <sup>37</sup>. However, the duty of withdrawal is not specifically foreseen in these provisions. The provisions of the Portuguese Lawyers’ Code of Conduct should be amended in order to reflect the duty of withdrawal where material violation of the law is taking place and the client is not persuaded not to breach the law.

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<sup>36</sup> See the Code of Conduct for Lawyers in the European Union, Preamble, point 1.1.

<sup>37</sup> *A Directiva sobre Branqueamento de Capitais e o Segredo Profissional da Advocacia, Uma “Transposição” ... “Transposta” “Avant la lettre”, (The Money Laundering Directive and the Legal Professional Privilege, “Implementation” ... “Implemented” “Avant la lettre”)* by courtesy of “Bastónario” Augusto Lopes Cardoso.

The lawyer cannot however report such a violation to any third parties this would be an intolerable betrayal of the fiduciary relationship that links the client to the lawyer and would pervert the concept of legal privilege as an inviolable fundamental right of citizens, as well as and probably no less important, the essence of the role of the lawyer in society as an independent professional, which certainly is not to be a policeman or an informer. However, if we think that the withdrawal by the lawyer, should be promptly communicated to the ruling Bar, the reasons and motives for such conduct, being closely connected to facts revealed under confidentiality, should not be divulged in any circumstance.

We fully accept and agree that the prevention of criminal activities as highly organized as money laundering, fraud or even child abuse, should be considered of extreme and vital importance in a democratic society. However, we think that citizens must be able to seek advice as to what is wrong or right, legal or illegal and the only persons that can provide such legal advice are lawyers. This cannot be achieved unless the relationship between lawyers and their clients is a relationship of absolute trust. The rights, duties and privileges given to lawyers are crucial elements in the protection of individual liberty in a democratic society underpinned by the rule of law and by absolute respect for the fundamental human right of access to Justice.

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